Dato' Haji Azman bin Mahalan v Public Prosecutor

HIGH COURT (IPOH) — CRIMINAL APPEAL NO 42–26 OF 2005
VT SINGHAM J
9 FEBRUARY 2007

Criminal Law — Corruption — Whether trial judge failed to evaluate the evidence judicially — Presumption under s 42(1) — Anti Corruption Act 1997 s 10(b)(aa)

Criminal Procedure — Witness — Calling of witness by prosecution — Prerogative of prosecution — Primary duty of the court to ascertain the truth from the best evidence — Whether contradiction in terms to require court to ascertain the truth and on the other hand to deprive the court of the best evidence

This was an appeal by the appellant against the decision of the sessions court judge who found the appellant guilty of the charges of corruptly having given gratification to wit, a sum of RM2,000 on the first charge and further sum of RM5,000 on the second charge as an inducement to Mohd Kamal bin Rabaai (PW1) in order that the said Mohd Kamal will not accept settlement from Pazli bin Abdullah Sani (PW6) so that Pazli bin Abdullah would remain a bankrupt and would not be qualified to contest against the appellant for the post of division head of UMNO, both the offences are under s 10(b)(aa) of the Anti Corruption Act 1997 ('Act') and punishable under s 16 of the same Act.

Held, allowing the appeal:

(1) The learned sessions court judge had in fact failed to evaluate the evidence judicially which had resulted in misdirection in law and on the facts; first, at the close of the prosecution's case, secondly, if it is found that there was a case for the appellant to answer the two charges, then the treatment given to the defence case at the close of the defence case was inadequate in law and unsatisfactory given the set of facts and circumstances. In the instant case, this court is of the considered view that it is a suitable case for appellate interference where the learned sessions court judge had failed to critically assess and analyse the prosecution's evidence (see para 6); *DP Vijandran v Public Prosecutor* [1999] 1 MLJ 385 referred.

(2) In the instant case, the presumption under s 42(1) of the Act comes into operation only when the factum or payment is proved to the satisfaction of the trial court (see *Jazuli bin Mohsin v Public Prosecutor* [1990] 2 MLJ 190). If payment is not proven as required by law, the presumption does not arise and consequently there is nothing where the accused is required to prove to the contrary (see *Attan bin Abdul Ghani v Public Prosecutor* [1970] 2 MLJ 143;

Public Prosecutor v Yuvaraj [1969] 2 MLJ 89). Therefore, there can be no mechanical or automatic application of the said presumption unless there is sufficient and reliable evidence of the payment as alleged in the charges to support the same. The quality and substance of the evidence must also be critically examined to consider the application of the said statutory presumption especially when it is not a trap case where marked currency notes are recovered from the accused (see *Public Prosecutor v Haji Ismail & Anor* [1940] MLJ Rep 60). On this ground itself and on the facts in the instant case, the learned sessions court judge ought not to have invoked the presumption under s 42(1) of the 1997 Act. Consequently, the defence ought not to have been called (see para 8).

(3) The prosecution cannot be allowed to fall back upon the evidence adduced by the appellant in support of his defence to rest or support the prosecution's case solely thereupon unless there was in fact sufficient evidence to establish a prima facie case at the close of the prosecution's case (see *Janal Singh v State of Punjab* 1996 Cri LJ 1139 SC). As the onus of proof rests throughout on the prosecution, it cannot rely on the strengths or weaknesses of the defence case to enhance or bolster its case. It must lead corroborative independent evidence to prove its case (see para 10).

(4) Notwithstanding strong judicial assertions on the prerogative of the prosecution as to the choice of witnesses to be called, it is by no means self evident and absolute that the prosecution's prerogative is greater than the demands of the public interest and justice in facilitating the availability of all relevant and materials of production in a criminal trial for the court to ascertain the truth of the charge. The primary duty of the court is to ascertain the truth from the best evidence available at the trial to determine the guilt or innocence of the accused who is charged. If a witness of fact is subpoenaed to attend court and when he attends court, he must answer such questions as the adversary properly put to him. This duty cannot be taken away by the prosecution through some other arrangement under the guise that it is the prerogative of the prosecution whom to call as their witness as it will be meaningless on one hand to require this court to ascertain the truth of the charge and on the other hand to deprive the court of the best evidence available even if the evidence is not likely to support the prosecution case 'seem to be contradiction in terms' (see para 25).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan hakim mahkamah sesyen yang mendapati perayu bersalah atas tuduhan-tuduhan memberi rasuah iaitu, jumlah sebanyak RM2,000 atas tuduhan pertama dan selanjutnya jumlah sebanyak RM5,000 atas tuduhan kedua sebagai dorongan kepada Mohd Kamal bin Rabaai (PW1) supaya Mohd Kamal tersebut tidak akan menerima penyelesaian daripada Pazli bin Abdullah Sani (PW6) agar Pazli bin Abdullah akan terus menjadi seorang bankrap dan dengan itu tidak layak bertanding dengan perayu untuk jawatan ketua bahagian UMNO, kedua-dua kesalahan di bawah s 10(b)(aa) Akta Pencegah Rasuah 1997 ('Akta') dan boleh dihukum di bawah s 16 Akta yang sama.

Diputuskan, membenarkan rayuan:

(1) Hakim mahkamah sesyen yang bijaksana sebenarnya telah gagal menilai keterangan dengan seadilnya yang mengakibatkan penyalaharahan dalam undang-undang dan atas fakta-fakta; pertama, pada penutupan kes pendakwa, kedua, sekiranya didapati terdapat kes terhadap perayu untuk menjawab kedua-dua pertuduhan tersebut terhadapnya, maka penilaian yang diberikan kepada kes pembelaan pada penutupan kes pembelaan adalah tidak mencukupi dalam undang-undang dan tidak memuaskan dalam fakta-fakta dan keadaan-keadaan kes ini. Dalam kes ini, mahkamah ini berpendapat bahawa kes ini adalah mewajarkan campur tangan rayuan dimana hakim mahkamah sesyen yang bijaksana telah gagal untuk menilai dan menganalisa kes pendakwa raya secara kritis (lihat perenggan 6); *DP Vijandran v Public Prosecutor* [1999] 1 MLJ 385 dirujuk.

(2) Dalam kes ini, anggapan di bawah s 42(1) Akta tersebut hanya berlaku apabila faktor atau pembayaran dibuktikan sehingga mahkamah perbicaraan berpuas hati (lihat *Jazuli bin Mohsin v Public Prosecutor* [1990] 2 MLJ 190). Jika bayaran tidak dibuktikan seperti yang dikehendaki oleh undang-undang, anggapan tidak berbangkit dan hasilnya tiada apa-apa bagi tertuduh untuk mengemukakan bukti yang bertentangan (lihat *Attan bin Abdul Ghani v Public Prosecutor* [1970] 2 MLJ 143; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89). Dengan itu, tiada penggunaan secara sendiri ataupun automatik berkenaan dengan anggapan tersebut kecuali sekiranya terdapat bukti yang mencukupi dan yang boleh dipercayai berkenaan pembayaran seperti yang dinyatakan di dalam pertuduhan-pertuduhan tersebut untuk menyokongnya. Kualiti dan asas bukti juga mesti diteliti secara kritis untuk menentukan penggunaan anggapan statutori tersebut terutama apabila ia bukannya satu kes perangkap yang mana nota wang yang telah ditanda dijumpai pada tertuduh (lihat *Public Prosecutor v Haji Ismail & Anor* [1940] MLJ Rep 60). Atas alasan dan atas fakta-fakta kes ini, hakim mahkamah sesyen yang bijaksana tidak sepatutnya menggunakan anggapan di bawah s 42(1) Akta tersebut. Lanjutan itu, pembelaan tidak seharusnya dipanggil (lihat perenggan 8).

(3) Pendakwaan tidak harus dibenarkan bersandar kepada bukti yang diberikan oleh perayu dalam menyokong pembelaannya untuk bergantung atau menyokong kes pendakwaan semata-mata, kecuali terdapat bukti yang mencukupi untuk membuktikan satu kes prima facie dipenutupan kes pendakwa raya (lihat *Janal Singh v State of Punjab* 1996 Cri LJ 1139 SC). Oleh kerana beban pembuktian sepanjang pendakwaan adalah dipihak pendakwa raya, ia tidak boleh bergantung atas kekuatan atau kelemahan kes pembelaan untuk menambahkan atau memperkukuhkan kesnya. Ia mesti mengemukakan bukti bebas yang menyokong untuk membuktikan kesnya (lihat perenggan 10).

(4) Walaupun terdapat penegasan kehakiman atas prerogatif pendakwa raya berkaitan dengan pilihan saksi-saksi untuk dipanggil, ia tidak semestinya dapat terbukti dan mutlak bahawa prerogatif pendakwa melebihi permintaan kepentingan awam dan keadilan dalam memberikan dan mengemukakan segala benda-benda yang relevan di perbicaraan jenayah di mahkamah untuk mengenalpasti kebenaran tuduhan tersebut. Kewajipan utama mahkamah ialah

untuk memastikan kebenaran melalui keterangan terbaik yang dapat diperolehi di perbicaraan untuk menentukan kebersalahan atau tidak tertuduh yang dituduh. Jika seorang saksi fakta disepinakan untuk menghadiri mahkamah dan apabila beliau menghadiri mahkamah, beliau mesti menjawab soalan-soalan yang dibentangkan oleh penentangnya. Kewajipan ini tidak boleh diambil daripada pendakwa melalui satu rancangan di bawah samaran ia adalah prerogatif pendakwa raya siapa yang harus dipanggil sebagai saksi mereka oleh kerana ia tidak bermakna langsung, di satu bahagian untuk memerlukan mahkamah ini untuk memastikan kebenaran tuduhan tersebut dan di satu bahagian yang lain mahkamah terkilan dengan keterangan terbaik yang sedia ada walaupun keterangan tersebut tidak menyokong kes pendakwa raya yang 'nampaknya satu percanggahan dalam syarat' (lihat perenggan 25).]

Notes

For a case on calling of witness by prosecution, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 4735.

For a case on corruptly giving gratification, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 83.

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Criminal Procedure Code s 180(1)
Evidence Act 1950 ss 114(g), 134

Muhamad Shafee Abdullah (Badrul Munir with him) (Shafee & Co), S Theivanthiran (Shan Theivanthiran with him) (Thevin Chandran & Associates) and Tun Ammar Aziz (Ammar Aziz & Co) for the appellant.

Nordin Hassan (Muhammad Sinti with him) (Deputy Public Prosecutors, Anti Corruption Agency) for the respondent

VT Singham J:

[1] This is an appeal by the appellant against the decision of the sessions court judge, Ipoh who found the appellant guilty on 22 August 2005 of the charges of corruptly having given gratification on 6 April 2001 to wit, a sum of RM2,000 on the first charge and further sum of RM5,000 on 9 April 2001 on the second charge as an inducement to Mohd Kamal bin Rabaai (PW1) in order that the said Mohd Kamal will not accept settlement from Pazli bin Abdullah Sani (PW6) so that Pazli

bin Abdullah would remain a bankrupt and would not be qualified to contest against the appellant for the post of Division Head of UMNO; Tapah on 22 April 2001; both the offences are under s 10(b)(aa) of the Anti Corruption Act 1997 ('Act') and punishable under s 16 of the same Act.

[2] The appellant was convicted and sentenced to two years imprisonment and fined a sum of RM10,000 in default of payment to six months imprisonment on the first charge and sentenced to two years imprisonment and fined a sum of RM25,000 in default of payment to one year imprisonment on the second charge. Both the sentences of imprisonment were ordered to run concurrently. Hence, this appeal. The two charges against the appellant are as follows:

First Charge

Bahawa kamu pada 6 April 2001, jam lebih kurang di antara 6 hingga 7 petang, di rumah No 29, Lengkok Pasar, Rapat Setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai sebanyak RM2,0000 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah s 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum dibawah s 16 Akta yang sama

Second Charge

Bahawa kamu pada 9 April 2001, jam lebih kurang di antara 8.30 hingga 11 malam, di rumah No 29, Lengkok Pasar, Rapat setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai sebanyak RM5,0000 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah s 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum dibawah s 16 Akta yang sama.

DECISION

Appellate Jurisdiction

[3] There are a plethora of authorities dealing with the principles when the appellate court should act in reviewing findings of fact. The general principle is that the appellate court is loathed to disturb or interfere with the findings of fact of the trial court who had heard and seen the witnesses giving evidence. However, that principle is not absolute. This court, which is sitting in its appellate capacity does not merely act as a proof reader that is to say to consider if there are any clerical or grammatical errors and is not permitted to critically examine the printed evidence with the grounds of judgment and the complaints raised in this appeal (see *Powell &*

Wife v Streetham Manor Nursing Home [1935] AC 243 at p 249; *Tan Pek Yan v Samuel* [1964] MLJ 283). Nevertheless, every case must depend on its own set of facts and particular circumstances and also decided cases of the superior courts on the function of an appellate court do furnish some rules and guidance which ought to be observed and govern this court in deciding this appeal.

[4] In the case of *Chian Han Kiat v Rex* [1937] MLJ 261, (Terrell, Acting Chief Justice) said at p 577 as follows:

> This is admittedly an appeal against findings of fact and I fully indorse the principle that an appellate court should but rarely interfere with the conclusions arrived by the judge or magistrate who has had the advantage of hearing the witnesses and obtaining an impression of their veracity from their demeanour. But it is the duty of an appellate court to be the judge of fact as well as of law and it would be abrogating its functions if it made a hard and fast rule never to interfere with findings of fact and felt bound to support judgment which on a review of all the evidence, is considered to be clearly wrong.

[5] In *Tan Thong Jin v Public Prosecutor* [2002] 3 MLJ 695, the Court of Appeal said at p 701 as follows:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived by the trial court to which the law entrusts the primary task of evaluation of evidence. But it is the duty of the appellate court to intervene in a case where the trial court had fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. (See *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

[6] On going through the notes of evidence recorded at the trial, the grounds of judgement of the learned sessions court judge, the entire record of appeal, the grounds raised in the petition of appeal and during the hearing in this appeal together with the submissions of both the learned counsel for the appellant and the learned DPP for the respondent, the authorities and the applicable law, this court is of the considered view that this is a suitable case for this court to interfere with the findings of the learned sessions court judge (see *Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 78 at p 77). This court has read and reread the evidence recorded by the learned sessions court judge and find the conclusion arrived at by the learned sessions court judge in finding the appellant guilty of both the offences cannot stand on the facts or law (see *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 at p 121). This court is satisfied that the learned sessions court judge had failed to take proper advantage of the evidence of the witnesses as seen and heard by him (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 at pp 41–42; *Yahaya Mohamed v Chin Tuan Nam* [1975] 2 MLJ 117). Credibility of witnesses did not depend only on the trial court's own subjective impressions of the witnesses but had to be considered also in the light of the other material that was available (see *Synn Lee & Co Ltd v Bank of China* [1962] MLJ 395 at p 396). The learned sessions court judge had infact failed to evaluate the evidence judicially which had resulted in misdirection in law and on the facts; first, at the close of the prosecution case, secondly, if it is found that there was a case for the appellant to answer the two charges, then the treatment given to the defence case at the close of

A the defence case was inadequate in law and unsatisfactory given the set of facts and circumstances. In the instant case, this court is of the considered view that it is a suitable case for appellate interference where the learned sessions court judge had failed to critically assess and analyse the prosecution's evidence (see *DP Vijandran v Public Prosecutor* [1999] 1 MLJ 385).

B

[7] In the instant case, this court finds that the evidence produced by the prosecution against both the charges was not sufficient to trigger the application of the statutory presumption as provided under s 42(1) of the 1997 Act against the appellant which was invoked by the learned sessions court judge unlike in a trap case where marked currency notes are recovered. Section 42 (1) of the 1997 Act states C that:

> 42. Presumption in certain offences.
>
> (1) Where in any proceedings against any person for an offence under ss 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, D or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

E

[8] In the instant case, the presumption under s 42(1) of the 1997 Act comes into operation only when the factum or payment is proved to the satisfaction of the trial court (see *Jazuli bin Mohsin v Public Prosecutor* [1990] 2 MLJ 190 at p 191). If payment is not proven as required by law, the presumption does not arise and F consequently there is nothing where the accused is required to proof to the contrary (see *Attan bin Abdul Ghani v Public Prosecutor* [1970] 2 MLJ 143 at p 145; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89). Therefore, there can be no mechanical or automatic application of the said presumption unless there is sufficient and reliable evidence of the payment as alleged in the charges to support the same. The quality and substance of the evidence must also be critically examined to consider the G application of the said statutory presumption especially when it is not a trap case where marked currency notes are recovered from the accused (see *Public Prosecutor v Haji Ismail & Anor* [1940] MLJ Rep 60 at p 62). On this ground itself and on the facts in the instant case, the learned sessions court judge ought not to have invoked the presumption under s 42(1) of the Act. Consequently, the defence ought not to H have been called. Merely saying by way of lip service that the presumption under s 42(1) of the Act is invoked without any proof and/or offering any reason is not sufficient in law and on the facts. The learned sessions court judge had failed to critically examine the evidence of PW1, PW3, PW6, PW10, PW11 and PW12 and in particular the position of PW1, the association between PW6 and the investigating officer (PW12) who is previously known to PW6 and the lack of seriousness shown I and the conduct of PW12 as the investigating officer in the whole episode.

[9] On both the charges, the defence had through cross examination of the witnesses shown the evidence of PW1 as being unreliable and unsafe to accept and also the evidence of PW12 as being so unsatisfactory and which has consequently left

several material gaps in the prosecution case. It is therefore not sufficient to raise the statutory presumption under s 42(1) of the Act. On the other hand, if it is found that there is sufficient evidence to raise the presumption under s 42(1) of the 1997 Act, the appellant had in fact successfully during the prosecution case itself from the evidence adduced by the prosecution witnesses rebutted the presumption on both the charges (see *Wong Chooi v Public Prosecutor* [1967] 2 MLJ 180; *Soo Seng Huat v Public Prosecutor* [1968] 1 MLJ 80; *Chee Chiew Heong v Public Prosecutor* [1981] 2 MLJ 287 at p 288; *Public Prosecutor v Lin Lien Chen* [1991] 1 MLJ 316 (HC); [1992] 2 MLJ 561 (SC); *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70 at p 78). Therefore, it is evident that the prosecution had failed to discharge the onus of proof required at the prima facie stage (see *Public Prosecutor v Saimin Ors* [1971] 2 MLJ 16). The learned sessions court judge had failed to direct his mind on this aspect judicially (see *Hakumat Rai Nigam Delhi v State* 1983 Cri LJ NOC 5 (Delhi); *Sitaram v State of Rajsthan* AIR 1975 SC 1432; *Suraj Mal v The State* AIR 1979 Sc 1404).

[10] It is evident that the appellant has through cross examination of the prosecution's witnesses raised doubt in the prosecution case that the payment referred to in the charges was not given to PW1 by the appellant so as to rebut the presumption under s 42(1) of the Act during the prosecution case itself. This court therefore is of the considered view that in those circumstances, the prosecution has failed to discharge the onus of proof (see *Raghubir Prasad v State* AIR 1955 NOC Orissa 3979; *Wong Chooi v Public Prosecutor* [1976] 2 MLJ 2180; *Public Prosecutor v Lin Lien Chen* [1991] 1 MLJ 316 (HC); [1992] 2 MLJ 561 (SC); *Public Prosecutor v Ting Sing Yong & Ors* [1998] 2 MLJ 73; *N Ramarao v SPE* 1974 ALT NOC 58; *Rabindra Kumar Dey v State of Orissa* AIR 1977 SC 170; *Kunhi Mohamed v State* AIR 1959 Ker 88). This court is also of the view that the prosecution cannot be allowed to fall back upon the evidence adduced by the appellant in support of his defence to rest or support the prosecution's case solely thereupon unless there was in fact sufficient evidence to establish a prima facie case at the close of the prosecution case (see *Janal Singh v State of Punjab* 1996 Cri LJ 1139 SC). As the onus of proof rests throughout on the prosecution, it cannot rely on the strengths or weaknesses of the defence case to enhance or bolster its case. It must lead corroborative independent evidence to prove its case. The importance of corroboration required by law as defined in *R v Baskerville* [1916] 2 KB 658 cannot be gainsaid.

[11] There is another aspect of the case which the learned sessions court judge had failed to direct his mind judicially that it is improbable that the appellant would offer bribe or hand over corrupt money in the presence of so many people including members of his family as was adduced during the prosecution case (see *Mohd Kassim v Public Prosecutor* [1981] 2 MLJ 91 at p 92; *RA Sah v State of Bihar* [2002] 2 BLJ 379; [2002] CriLJ 3899). In the circumstances and on the facts in the instant case, the presumption under s 42(1) of the Act cannot be applied and ought not to have been invoked against the appellant on the first charge (see *Banshi Lal Yadav v State of Bihar AIR* 1981 SC 1235). In fact, the learned session court judge ought to have found that PW1 had exceeded the role of a witness to be protected under s 44(1)(a) of the Act and instead ought to have found PW1 as an accomplice as defined by law (see *Wong Kok Wah v R* [1955] MLJ 46). Section 44(1)(a) of the 1997 Act states:

44. Evidence of accomplice and agent provocateur.

(1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act

(a) no witness shall be regarded as an accomplice by reason only of such witness having:

(i) accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any gratification from any person;

(ii) given, promised, offered or agreed to give any gratification; or

(iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

(b) *no agent provocateur*, whether he is an officer of the Agency or not, shall be presumed to be unworthy of credit by reason only of his having attempted to commit, or to abet, having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and

(c) any statement, whether oral or written, made to an *agent provocateur* by such person shall be admissible as evidence at his trial.

(2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or *agent provocateur* shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence. (Emphasis added.)

[12] On the other hand and even assuming that PW1 does not fit under the definition of an accomplice which this court is of the view otherwise, the learned session court judge ought to have found at least on the totality of the evidence that the conduct and role played by PW1 in the whole episode amounts to dishonesty, trickery and tainted with moral turpitude. Accordingly, the learned session court judge ought to have rejected the evidence of PW1 as against both the charges as being unreliable or looked for corroboration as defined in *R v Baskerville* [1916] 2 KB 658 (see *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134; *Sarwan Singh v State of Punjab* AIR 1957 SC 637 at p 641; *DPP v Kilbourn* [1973] 1 All ER 440 at p 452; *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220 at p 222). The established test in *Baskerville* consist of two basic elements; first, the corroborating evidence must be independent and secondly, it must confirm in a material particular that the accused committed the offence (see *Dowse v Attorney General, Federation of Malaya* [1961] MLJ 249 at p 252). In other words, the least the learned session court judge ought to have directed his mind and satisfied himself that the evidence of PW1 had met the twin tests of reliability and corroboration which he had failed to do so, ie, the prosecution has to satisfy the court not only that evidence of PW1 is in general credible, but also there is an independent corroboration in material particulars which is lacking and which does not meet the twin tests (see *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153 at p 155) In this respect, this court is mindful of the provision of s 44(2) of the Act and that the testimony of a single, honest and trustworthy witness can be accepted to establish the charge. What matter is quality and not the quantity. However, in the instant case, the position of PW1 cannot be

considered as an honest and trustworthy witness. Accordingly, the learned sessions court judge ought to have found him as that of an undiluted accomplice and it is a rule of prudence that his evidence is corroborated although this requirement is not on account of any rule of law but it is a cautioned prudence (see *Mohamed Taufik v Public Prosecutor* [1975] 1 MLJ 36). It is also desirable in practice that the court must caution itself in sufficient terms to the danger of acting with it and record the same in the judgment (see *Ng Yau Thai v Public Prosecutor* [1987] 2 MLJ 214). In fact, where '…the complainant is in the nature of accomplice, his story prima facie is suspect' (see *Gulam Mahmood A Malik v Satte of Gujurat* AIR 1980 SC 1158; *Panchanan Rao v State of Orissa* 1191 Cri LJ 2442).

[13] Accordingly, the learned sessions court judge ought to have found that there was no prima facie case established against the appellant on both the charges. Consequently, he ought not to have ordered the appellant to enter to his defence on both the charges.

[14] In the instant case, this court also finds that there appears to be a contradiction in the findings of the learned session court judge is so far as PW3 on the first charge where he has said *keterangan SP1 telah disokong oleh SP3 yang menyaksikan pemberian wang P6* (ie, the sum of RM2,000) oleh OKT kepada SP1 pada 6 April 2001. However, later on, the learned session court judge has said that:

> SP3 tidak mengetahui jumlah sebenar wang yang diberikan oleh OKT kepada SP1 pada malam 6 April 2001 telah dijelaskan olehnya bahawa peranannya hanyalah mengaturkan pertemuan antara SP1 dengan OKT sahaja. Beliau tidak berminat untuk mengetahui jumlah wang yang diberi.

On the same issue of payments, ie, the currency notes (P6 and P9) the learned session court judge further erred in law and on the facts in his finding when he held that:

> Isu cap jari hanya boleh dibangkitkan jika timbul isu identiti'. ' Oleh kerana identiti P6 dan P9 secara positif dan nyata telah diberikan oleh OKT kepada SP1 maka persoalan cap jari tidak perlu dan tidak relevan lagi

And he relied on the case of *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560.

[15] This finding with respect, is a misdirection because the appellant had throughout the prosecution case maintained and challenged the evidence of PW1 and PW3 and made it clear that the appellant had not handed any money to PW1 on both the dates as per the charges and this has been confirmed by the investigating officer(PW12) that as far as he is aware, the appellant has denied giving any money to PW1. PW12 has also testified that he is not aware whether the money alleged to have been handed to PW1 were ever shown to the appellant at the time when his cautioned statement was recorded three years later. Infact, it was the contention of the appellant that the money which was handed to PW12 by PW1 was not given by the appellant.

[16] Accordingly, first, the appellant had rightfully contended that the investigating agency should have obtained scientific evidence on the currency notes

ie, fingerprint evidence which it had failed to do so and no explanation was advanced for this failure. Secondly, the decision in *Public Prosecutor v Mansor bin Mohd Rashid & Anor* which was given on the particular facts of that case was taken out of context and erroneously applied to the facts in the instant case without having distinguished the facts in that case as to the sufficiency of the evidence which did not require scientific evidence in that case when compared to the facts in the instant case. Therefore, the learned sessions court judge ought to have held that the fingerprint evidence on the currency notes (exhs P6 and P9) ought to have been obtained by the investigating agency since the appellant had challenged and contended that the said currency notes which was handed to PW12 by PW1 was not given by the appellant (see *Teow Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220; *Su Ah Ping v Public Prosecutor* [1981] MLJ 75; *Abdul Jalil Abdul Sattar v Public Prosecutor* [1991] 1 MLJ 1).

HOSTILE WITNESS

[17] A hostile witness is one who in the opinion of the judge shows no desire to tell the truth at the instant of the party calling him and to whom he may display a hostile animus (see *R v Darby* [1989] CrLR 817; *R v Maw* [1994] CrLR 841; *Attygalle & Anor v The King* [1936] AC 338). The question whether a witness is hostile is for the judge alone to decide and the court will decide whether a hostile witness should be treated as creditworthy at all (see *Price v Menning* [1889] 42 ChD 372; *Public Prosecutor v Subramani* [1937] 1 MLJ 57). It cannot be disputed that a conviction or an acquittal of a person is depended upon evidence which is obtained through investigation which results in his trial (see *Rice v Howard* [1886] 16 QBD 681). Therefore, a witness should not be withheld and treated as being hostile unless he is tested in the witness' stand. This function to determine whether a witness is hostile is for the judge alone to decide and the prosecution cannot usurp the function of the court and brand a witness as being hostile and choose arbitrarily not to call him as a witness or offer him as a witness during the prosecution's case for the defence to cross examine him (see *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346 at p 348; *State of Uttar Pradesh v Chet Ram & Ors* [1990] 1 CLJ 1079 at p 1083; *Ashim Das v State of Assam* [1997] CriLJ 1533 at p 1537; *Satpaul v Delhi Administration* AIR 1976 SC 294; *State of UP v Jaggo* AIR 1971 SC 1586). It is interesting to note at this stage that the learned DPP from the Bar has made a statement that the witness, Osmani(DW2) was not called as a prosecution witness because he is a hostile witness. Whereas, when the defence called.Osmani (DW2) as a defence witness, the learned sessions court judge has said that Osmani (DW2) had destroyed the defence case. In other words,the learned sessions court judge has completely taken an opposite view of the position and testimony of Osmani (DW2). If this court were to accept the finding of the learned sessions court judge that Osmani (DW2) had destroyed the defence case, then obviously he cannot be a hostile witness for the prosecution and ought to have been called as a prosecution witness. Merely giving unfavourable testimony cannot be sufficient to declare a witness as hostile for he might be telling the truth which goes against the party calling him.

[18] It is not the law that a witness is to be treated as a hostile unilaterally by the prosecution simply because he/she is in the 'camp' of the appellant or if in speaking

the truth this testimony happens to go against the party calling him. The explanation by the learned DPP on the issue that Osmani(DW2) is a hostile witness was not elaborated. The evidence of a hostile witness need not also be rejected in toto just because he has not supported the prosecution as the court can rely on certain portion of his evidence if it is found and satisfied that it is the truth (see *Charles Waker Devadas v State* 1993 (3) Crimes 926 (Mad); *Tulshiram v RC Pal* AIR 1953 Cal 160; *Sarasdawathaamma v Bhad Pamma* AIR 1970 Mys 157; *Bahgwan Singh v Satte of Haryana* AIR 1976 SC 202; *Kujji v State of MP* [1991] SCJ Cri 518; *Shankarlal v Satte of MP* [1982] CriLJ 254 (MP); *Dullalchand v State* [1988] CriLJ 1835 (Cal); *Uppari Vengadaswami v Public Prosecutor* [1996] 1 SCJ 558; *Chamara Pardhan v Satte* [1983] CriLJ 176 (Orissa)). In the instant case, this court is of the considered view that Osmani (DW2) who subsequently was called as a witness for the defence case was specifically a relevant witness to the events alleged in the second charge. The explanation given by the learned DPP from the Bar for the failure to call Osmani (DW2) was that he is a hostile witness may suggest a misapprehension concerning the ordinary duty to place before the court all relevant and material evidence concerning the charge (see *Rattanlal v State of Madhya Pradesh* [1994] 1 HLR 4; *State of Karnataka v Aavasekliar* [1983] 2 KANTLJ 227; *Rattanlal Paul v State of Tripura* [1983] 2 GAULR 395 (BD); *Lokhnath Panda v State* 1971 2 CWR 121). On the facts, this court is of the considered view that failure to call Osmani (DW2) as a witness for the prosecution has created a material gap in the prosecution case for which it will have to accept the fate (see *R v Apostilides* [1984] 154 CLR 563 at pp 575–577).

A B C D E

ADVERSE INFERENCE

[19] Generally, in criminal cases, the prosecution is bound to call all the material witnesses before the court, in order that all the facts may be before the court, even though they may give an inconsistent account, subject of course to s 134 of the Evidence Act 1950. However, in certain cases there may be a need for certain category of witness to be corroborated and will depend on the facts of the case (see *Lim Boon San v Public Prosecutor* [1968] 2 MLJ 45; *People (A-G) v Cassey (2)* [1963] IR 35; *R v Harris* [1927] 2 KB 587 at p 590). On the other hand, it is only eminently proper that the prosecution should be allowed to conduct their case according to their own view or how it should be presented so long as witnesses essential to the unfolding of the narrative on which the prosecution is based is not withheld. In fact witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the case of the prosecution (see per Lord Roche in *Seniviratne v R* [1936] All ER 36 at p 39; *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 at p 441; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 at p 18, *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 637; *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at pp 493–494; *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222 at p 224; *Adill Muhammad El Dabba v AG of Palestine* 1944 AC 156).

F G H I

[20] However, the prosecution must be conducted on the principle of absolute fairness and should not keep back matters which would assist the appellant for the

truth to prevail in the trial and eventually would assist the court to ascertain the truth and come to a just decision. The true limit for the prosecution to exercise their discretion as to whom they should call to establish their case should only be to such extent that no unfairness should be visited upon an accused. The prosecution must offer to the defence during the prosecution case the particular witness who is an important and material witness who may throw light as to the truth of what has been alleged against an accused person in order that the whole of the facts may be before the court. Merely offering witnesses to the defence at the close of the prosecution case does not relieve the prosecution of its duty to produce in the instant case at least one of the four persons present during the second alleged transaction on 9 April 2001 to support the second charge. The complainant (PW1) being an interested and a partisan witness who has concurred in the commission of the offence ie, subject to proof that the appellant had infact handed the corrupt money to PW1. PW1 is a willing partisan in the alleged offence and not a victim of the offence who was under compulsion or pressure to accept the alleged payment.

[21] It is to be observed from the notes of evidence and the evidence of PW1 himself that it was the prosecution's case that Osmani (DW2) was present when the alleged payment of RM5,000 was handed by the appellant to PW1 on 9 April 2001 in respect of the second charge which was denied by the appellant and this denial was put to PW1. If that was the case of the prosecution that Osmani (DW2) was present in respect of the second charge when the RM5,000 was allegedly handed to PW1 which was denied by the appellant during the prosecution case and considering the statement (exh D28) of the appellant which the prosecution had in their possession, the prosecution should have called Osmani (DW2) during the prosecution case (see *Panchanan Rout v State of Orissa* 1991 CriLJ 2442 at pp 2448, 2449–2454). The fact that Osmani (DW2) was offered to the defence and that Osmani (DW2) was called as a defence witness does not relieve the prosecution of its duty to establish the charge on a prima facie case against the appellant as required by law (see s 180(1) of the Criminal Procedure Code; *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301). In *Balachandran v Public Prosecutor*, His Lordship Augustine Paul JCA(as he then was) speaking for the Federal Court described a 'prima facie case' in the following terms:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase ' prima facie case' is defined in similar terms in *Mozley and Whiteley 's Law Dictionary* (11th Ed) as:
>
> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at

the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393).

[22] Prior to the decision in *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, the question of veracity and accuracy of recollection of witness were left suspended until after the close of defence. However, it is now made clear by the decision in *Looi Kow Chai v Public Prosecutor* and *Balachandran v Public Prosecutor*, the trial court must at the close of the case of prosecution undertake a maximum evaluation of the evidence adduced on behalf of the prosecution which includes 'a positive evaluation of the credibility and reliability of all the evidence so as to determine whether the elements of the offence has been established'.

[23] Therefore, failing to produce Osmani (DW2) during the prosecution case itself triggers an adverse inference against the prosecution case under s 114(g) of the Evidence Act 1950 (see *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627 at pp 633, 635, 637–640; *Sinnasamany v Public Prosecutor* [1956] MLJ 36 at p 37; *Abdul Jalil Abdul Satar v PP* [1991] 2 MLJ 194; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; *Teow Hoe Chye v Public Prosecutor* [1987] 1 MLJ 220 at p 229; *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 at p 441).

[24] Where the evidence of a witness produced by the prosecution, in this instant case namely PW1 and PW3 has a serious animus against the appellant or cast doubt or is considered unreliable then it is incumbent on the prosecution to examine the witness who had witnessed the incident or offer him for examination to the defence during the prosecution case (see *Bir Singh v State of UP* AIR 1978 SC 59). The fundamental principle in our judicial system is that all relevant best evidence must be produced in a criminal trial for the court to ascertain the truth. However, if the prosecution is allowed to take shelter under the guise that it is for them to decide who they wish to call even if the particular witness is an important and a material witness who may be able to throw light on the truth of the prosecution's case against the appellant that fundamental principle would be seriously impaired just as clearly and with equal injury to our criminal justice system in this jurisdiction that an accused is presumed innocent until proven guilty. Although the prosecution is not bound to produce all the witnesses present or said to have witnessed the incident; nevertheless, important and material witnesses considered necessary for unfolding the prosecution's case has to be produced.

[25] Be that as it may, notwithstanding strong judicial assertions on the prerogative of the prosecution as to the choice of witnesses to be called, it is by no means, with respect, self evident and absolute that the prosecution's prerogative is greater than the demands of the public interest and justice in facilitating the availability of all relevant and materials of production in criminal trial for the court to ascertain the truth of the charge. The primary duty of the court is to ascertain the truth by the best evidence available at the trial to determine the guilt or innocent of the accused who is charged.

If a witness of fact is subpoenaed to attend court and when he attends court, he must answer such questions as the adversary properly put to him. This duty cannot be taken away by the prosecution through some other arrangement under the guise that it is the prerogative of the prosecution whom to call as their witness as it will be meaningless on one hand to require this court to ascertain the truth of the charge and on the other hand to deprive the court of the best evidence available even if the evidence is not likely to support the prosecution case 'seem to be contradiction in terms'. Each case has to be tested on a touch stone of a judicial scrutiny and the prosecution has to be conducted on the principle of absolute fairness. In *BA Rao & Ors v Sapuan Kaur & Anor* [1978] 2 MLJ 146 Raja Azlan Shah FC (His Royal Highness) said at p 151:

> In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.

[26] This court would observe that there is also a duty of candour resting on all professionals be it the learned DPP or a counsel who represent the state or the accused respectively if this court is to arrive at a just decision as candour is crucial. In this respect, it must safely be assumed that the public prosecutor stands not necessarily for conviction but for justice as he is not expected to have any personal interest in a case. On the other hand, it is important to state at this stage that the duty of the investigation agency of any crime is to discover the truth and not simply to obtain evidence for the purpose of securing a conviction. In so far as the prosecution, as stated above, it is a duty of the prosecution to bring out in evidence everything in favour of the accused person and lay before the court all the evidence even though some of that evidence may result in an acquittal (see *Shukul & Ors v Emperor* AIR 1933 Allahabad 314).

THE CONDUCT OF PW1

[27] On the set of facts in the instant case, PW1 has shown himself to be an unreliable witness and the justification for treating him as such can be derived from the evidence which are as follows:

(1) After having lodged the report (exh P4) with the ACA at 3pm on 6 April 2001 as PW1 felt there was a possibility of existence of corruption (*rasa mungkin wujudnya saya akan dirasuah*), PW1 went to the appellant's house on the same day without informing any ACA officer or PW12. Infact PW1 went through the 'backdoor' of the ACA despite the fact that he felt there was possibility of the existence of corruption coupled with the fact that he has stated in the report (exh P4) *pemberian wang akan dibuat oleh Dato' Azman di tempat, tarikh dan masa dan akan ditentukan oleh Dato' Azman sendiri olehnya*. On these facts itself, PW1 ought to have informed PW12 of his intended visit to the appellant's house but he had failed to do so. There has been no explanation by the prosecution of this motive and the failure on the part of PW1 for not

informing PW12 of his intended visit to the appellant's house even if his visit was at the invitation of the appellant because at the time when PW1 went to the appellant's house with PW3, PW1 has already lodged a report to the ACA (PW12). A

(2) Despite having informed PW6 on 6 April 2001, at about 2.30pm that there is some element of corruption, he still went to the appellant's house without the knowledge of PW6 and PW12 and no explanation was sought by the prosecution from PW1 on this calculated move. B

(3) Prior to lodging of the report (exh P4), on 6 April 2001, PW1 is alleged to have contacted PW12 of his feeling of the existence of the alleged corruption. PW12 then informed PW1 to come later in the afternoon because he was going for his prayers whereas PW1 has testified that after 10am he had contacted ACA officer. C

(4) Upon receiving the sum of RM2,000 from the appellant at 6pm as alleged, PW1 did not immediately contact PW12 or proceeded straight to the ACA office to inform of the alleged bribe but instead waited for nearly four hours until at about 11pm when he contacted PW12. D

(5) It became more critical when the ACA officer (PW12) instructed PW1 when he contacted him to come the next day as he was not prepared to meet PW1 the same night although the learned DPP has informed the Bar that ACA office is open twenty four hours. E

(6) There is also no evidence whether PW12 had reduced into writing the report of the alleged bribe of RM2,000 when PW1 is alleged to have informed him over the telephone at about 11pm on 6 April 2001 that the appellant had given him the sum of RM2,000. F

(7) There is no evidence that PW1 had refused to accept the alleged bribe of RM2,000 on 6 April 2001 or he was under pressure or compulsion to accept the alleged sum of RM2,000. If PW1 had no intention to accept the alleged sum of RM2,000, he should have gone straight to the ACA office or contacted PW12 on receiving the alleged sum of RM2,000. Infact, as stated above, PW1 went to the appellant's house through the 'backdoor' of the ACA office on 6 April 2001 at 6 pm and kept the alleged bribe money for nearly four hours without informing the ACA officer (PW12) until about 11pm. G

(8) There has been no explanation from PW1 why he did not inform PW3 who had taken him to the appellant's house how much money the appellant is alleged to have been given him if PW1 was serious of his report (exh P4) since PW3 was aware as to why he had taken PW1 to the appellant's house. H

(9) PW1 is not just an innocent receiver of the alleged bribe payment but prima facie an accomplice. Infact, the learned sessions court judge had erred on the facts when he held that PW12 did not expect the appellant to give the alleged bribe money on 6 April 2001 and this flies in the face of the report lodged by PW1 himself on 6 April 2001 at 3pm that he felt the existence of corruption where he had stated *pemberian wang akan dibuat oleh Dato' Azman di tempat, tarikh dan masa dan akan ditentukan oleh Dato' Azman sendiri olehnya*. The conduct of PW1 can be derived from the prosecution's evidence on the I

relevant date as to the first charge which is so highly suspicious that it would be unsafe to place any reliance on his evidence (see *Satpalnegi v Satte of Haryana* [1996] 1 Crimes 408 (PNH); *Madhukar Mutu Balekar v State of Maharashtra* [1992] CriLJ 2366 at pp 2386; 2396 (Bomba); *PanchanathRao v State of Orissa* [1991] CriLJ 2442).

[28] On the totality of the facts, PW1 has shown himself to be not just an innocent receiver of the alleged bribe but an active participant unlike the facts and explanation which was given by the complainant in the case of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 which is distinguishable on the facts and poles apart. On the facts in the instant case, the learned sessions court judge had erred in law when he found that PW1 was not an accomplice. Had he found PW1 to be an accomplice or his evidence being tainted, the trustworthiness of PW1 would not have been the same as found by the learned sessions court judge and accordingly would have affected the finding of guilt by the learned sessions court judge (see *Thomas v Thomas* [1947] All ER 5823; *Nadarasa v Public Prosecutor* [1972] 2 MLJ 47; *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; *Mohd Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 171; *Public Prosecutor v Chong Bo See* [1988] 3 MLJ 292 at p 302).

[29] There are also several material gaps in the prosecution case which remain unexplained apart from other infirmities and this would go to show that the evidence of PW1 on the alleged bribe as per first charge must be treated with caution when viewed in its totality and is not safe to accept unless there was some corroboration. In fact, the conduct of PW12 where he instructed PW1 to see him the next day instead of the same night is also questionable whether in actual fact PW1 was bribed with the sum of RM2,000 by the appellant as alleged bearing in mind that the defence had challenged the testimony of PW1 that the appellant did not hand any money to him. Infact the Anti Corruption Agency was not even serious in accepting PW1's version of the alleged bribe on 6 April 2001, otherwise there should have been a follow up immediately on that night itself and the alleged money ought to have been recovered and the currency notes sent for fingerprint evidence (see *Ramjai Singh Pawar v State of Maharashtra* 1986 2 Crimes 8 (Bombay); *Panchanath Rao v State of Orissa* [1991] CriLJ 2442). It is obvious that the investigation is far from satisfactory to make out a prima facie case and the following factors ought to have been taken into consideration by the learned sessions court judge which he had failed.

(1) There is no evidence why PW12 did not question PW1 and neither was he taken by surprise when PW1 contacted him at 11pm that he has been handed the sum of RM2,000 by the appellant since PW1 did not inform PW12 of his visit to the appellant's house prior to the visit;

(2) There is no evidence why PW1 visited the appellant on 6 April 2001 without the instruction of PW12 or anyone from the ACA and after having lodged the report (exh P4) at the ACA office in the afternoon on 6 April 2001.

(3) The alleged bribe was related to the report (exh P4) lodged by PW1 and it required PW12 as the Investigative Officer to have taken positive steps and immediately to recover the alleged payment from PW1 on the same night so that scientific evidence could have been obtained from the currency notes if

there was any finger print of the appellant. In fact the learned DPP from the Bar has said that the Anti Corruption Agency Department is open 24 hours. Therefore, PW1 should have gone straight to the office of the ACA on 6 April 2001 since he had lodged a report in the afternoon at the ACA office and no prompt action was taken by the ACA;

(4) Why PW12 did not reduce into writing such a material piece of evidence the same night when PW1 had contacted him and informed him of the alleged bribe by the appellant. If this information was reduced into writing and produced in court, it could have at least to some extent supported PW1's evidence that he did receive RM2,000 from the appellant on 6 April 2001 and accordingly, would have supported the evidence of PW1 and PW12 that PW1 had in fact contacted PW12 the same night.

(5) There was no evidence as to what action was taken by the ACA from 6 April 2001 to 9 April 2001 on the complaint (exh P4) lodged by PW1 despite the alleged payments on 6 April 2001. Why was there no positive action taken by the ACA on the first complaint of the alleged transaction on 6 April 2001 and there was also no explanation for the same.

[30] As to the second charge, the evidence of PW1 is more doubtful as to whether he was in fact given RM5,000 by the appellant on 9 April 2001 inter alia for the following reasons:

(1) There was no reason why PW3 was not invited to follow PW1 to the appellant's house on the second occasion even though he was supposedly to have taken by PW1 to the appellant's house on the first occasion where the payment of RM2,000 is alleged to have been given to PW1 in the presence of PW3. There was no evidence that PW3 was not willing to co-operate with the Anti Corruption Agency or PW3 had refused to accompany PW1 on 9 April 2001.

(2) The evidence of PW1 would be on a firmer ground if only PW3 had witnessed the handing over of the RM2,000 on 6 April 2001 as PW3 has testified that he does not know the amount and neither did PW1 inform PW3 as to the amount.

(3) Why PW12 did not direct PW1 to hand over the alleged payment which was received from the appellant on 9 April 2001 to PW11 or to the other officer namely, Firdaus who was with PW11 immediately outside the appellant's house if infact there was any money which was passed by the appellant to PW1. There is also no evidence why PW1 had not informed PW11 immediately outside the appellant's house that the appellant had handed him the RM5,000 if in fact the said payment was handed to PW1 by the appellant.

(4) As admitted by PW12, the carpet inside the motorcar was also not searched to ensure there was no money kept by PW1 before PW1 left to the appellant's house on 9 April 2001 whereas PW11 has testified that the motorcar of PW1 itself was not searched.

(5) Why was PW12 so secretive of the whole alleged transaction and dealt with the entire transaction solely by himself without obtaining any assistance from

PW11 so as to support or give credence to the version of PW1 if in fact what has been testified in court by PW1 is the truth.

(6) Why was there no attempt made to obtain scientific evidence on the currency notes to show any finger print of the appellant since the defence had denied ever handing any money to PW1 on both the dates as alleged in the charges. If the appellant had handed the money to PW1, obviously the appellant would have counted the currency notes by using his fingers ie if the money had been handed by him and there was a possibility of having obtained fingerprint evidence if the currency notes was obtained from PW1 immediately and sent for fingerprint testing but this was not done (see *Panchanan Rout v State of Orissa* [1991] CriLJ 2442 at pp 2448, 2449-2454).

(7) To make matters more doubtful as to the alleged bribe by the appellant, PW12 did not even call the appellant or had gone to see him immediately after 9 April 2001 despite the reports and the alleged bribe or neither was both sets of currency notes shown to the appellant when the appellant was contacted by the ACA three years later so that the appellant could have responded on the truth of PW1's story of the alleged bribery and given detail account of what transpired at his house on both the dates.

[31] This court is also unable to appreciate why it took three years for the ACA to obtain the statement (exh D28) from the appellant on 14 April 2004 in order to conclude the investigation when the learned DPP has said from the Bar that this is the easiest case he had handled. No adequate or satisfactory reason has been disclosed at the trial or any explanation was offered for the inordinate delay and undue and unreasonable length of time taken in its determination except for a bare statement of the learned DPP from the Bar that the investigating agency have to be careful as it involved a member of the state executive council (see *Panchanan Rout v State of Orissa* [1991] CriLJ 2442 at pp 2448, 2449–2454).

[32] In the case of *Mathew Lim v Game Warden, Pahang* [1960] 26 MLJ 89, Adams J said:

> I think I should draw the attention of the proper authorities to the legal maxim interest reipublicae ut sit finis litium. It is essential to the efficient administration of justice that cases be brought by the prosecution promptly and disposed of as quickly as possible by the court. The good administration of justice requires the guilty to be punished and the innocent acquitted. It is fair neither to the prosecution nor the defence to delay the prosecution case as was done here.

[33] In the case of *Teoh Siew Lean (f) & Anor v Public Prosecutor* [1958] 24 MLJ 154, Rigby J has said:

> It took, therefore, a matter of over seven months for this case to be determined. No adequate or satisfactory reason is disclosed upon the record to offer any explanation whatsoever for the undue length of time taken in its determination. The effect of such delay is not only to dull the memory of potential witnesses as to the details of the incidents concerning which they are called upon to testify but also and of far more sinister importance in this country-to afford an opportunity to evil minded persons to tamper with and improperly influence

actual or potential, but reluctant witnesses. Inexcusable delays of this nature can do nothing but bring the due and proper administration of justice into contempt and disrepute.

[34] In *Nashatar Singh s/o Bhag Singh v Public Prosecutor* [1986] 2 CLJ 452 at p 457, his Lordship Edgar Joseph Jr (as he then was) observed as follows:

> … although the complainant alleged corruption against both the appellant and his senior colleague, only the appellant was prosecuted, he being arrested one year and four months later. It is therefore not unreasonable to assume that even the prosecution did not give much credence to the complaint in so far as it affected the appellant's colleague although this represented a significant part of the complaint. The learned President did not seem to appreciate this point since she merely mentioned in passing 'It was the prerogative of the prosecution to charge only one of them'.

[35] In the instant case, although the learned DPP had in the course of his submission said that this is 'the easiest case', then on the same token it should have also been the easiest case for the relevant agency to charge the appellant at the earliest possible time and certainly not to wait for three years to record the statement (exh D28) from the appellant. In fact there is no evidence that the appellant was ever called to the office of the Anti Corruption Agency immediately after the report (exh P4) were lodged by PW1 on 6 April 2001 and the monies alleged to have been given by the appellant to PW1 which were handed to the Investigation Officer (PW12) on 6 April 2001 and 9 April 2001 respectively. It is just unacceptable to justify the delay of three years before the appellant's statement was recorded, arrested and charged in court on 14 April 2004 on grounds as contended by the learned DPP that PW12 was following instruction and the reason of the delay of three years was also not elaborated.

[36] In fact, the reason given by PW12 for the delay was:

> bukanlah semua aduan yang disiasat akan berakhir dengan tangkapan. Tangkapan dibuat bila ada keperluan berdasarkan fakta kes tersebut. Tidak semua kes aduan dibuat terus tangkapan dibuat. Ia berdasarkan keperluan siasatan dahulu dan sekiranya ada keperluan untuk lakukan tangkapan baru tangkapan dibuat. Apabila suatu aduan dibuat kepada BPR, aduan itu akan dikaji terlebih dahulu samada berasas atau tidak untuk pihak BPR memulakan siasatan. Saya telah berbincang dengan Pengarah saya untuk merangka strategi dan tindakan susulan serta klasifikasi kesalahan. Dalam kes ini, ia bukanlah merupakan kes perangkap jadi tangkapan tidak perlu dibuat serta merta sebaliknya siasatan perlu dilengkap terlebih dahulu sebelum kes dirujuk kepada TPR untuk dapat izin mendakwa. Setakat 7 April 2001, siasatan masih lagi di peringkat awal, tidak ada cadangan pada peringkat awal itu.

[37] At this stage, it is important to state that the Pengarah was not called as a witness although PW12 has mentioned of the Pengarah on other occasion being involved in the investigation of this case. This delay in recording the statement of the appellant (exh D28) as submitted by learned counsel for the appellant is certainly prejudicial to the appellant. First, he was unable to relate the whole episode in a precise, clear and chronological manner. Secondly, he cannot be expected to remember details of alleged incidents which happened three years previously

especially when this is a case where the appellant has denied the charge of having bribed PW1 on the said dates as per the charge. Thirdly, the alleged telephone calls which he had explained has shown that there were only one call and not two calls (see exh P26) (see *Mohd Alias v Public Prosecutor* [1983] 2 MLJ 172 at p 173; *Pie bin Chin v Public Prosecutor* [1988] 1 MLJ 234 at p 236)

STATEMENT OF APPELLANT UNDER s 45 OF THE ACT

[38] The learned sessions court judge cannot just dismiss the story of the defence as contained in the statement (exh D28) as required by s 45(3) of the Act as bare denial especially when it was recorded three years later on 14 April 2004 when in fact at the time all the material evidence was already in the possession of the investigating agency as early as 9 April 2001. Forgetfulness and failure to recall exactly certain event by a witness does not necessarily shake his credibility or render other part of his story unworthy of belief. Various persons are endowed with verifying power of cognition, attentiveness and perception so that it is not uncommon for a witness to positively and categorically state certain events and for others not to remember details due to length of time.

[39] There is also nothing mentioned in the statement (exh D28) which was recorded on 14 April 2001 to alert the appellant and whether he was informed precisely by the recording officer of what PW1 had reported to the Anti Corruption Agency against the appellant on 6 April 2001 and 9 April 2001 and details of the events on both the alleged dates so that he can answer the charges precisely and provide details and disclose his defence to the allegation by his statement (exh D28) as required by him pursuant to s 45(3) of the Act. Details of the reports which have been made by PW1 against the appellant and the money which was handed to PW12 allegedly to have been given by the appellant to PW1 on 6 April 2001 and 9 April 2001 ought to have been shown to the appellant at the time when the statement (D28) was recorded from him. This requirement that the appellant ought to be informed of the details of the report lodged against him by PW1 and shown the alleged money (exh P6 and P9) which was handed to the investigating officer (PW12) should have been observed by the recording officer of the statement (exh D28) especially in view of the consequences as contained in subsection (6) of s 45 of the Act and it cannot be compromised. Section 45 of the Act states:

> 45. Admissibility of statements by accused persons.
>
> (1) In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of an investigation or not and whether or not wholly or partly in answer to questions, by an accused person to or in the hearing of any officer of the Agency, whether or not interpreted to him by any other officer of the Agency or any other person, whether concerned or not in the arrest of that person, shall, notwithstanding any written law or rule of law to the contrary, be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.
>
> (2) No statement made under subsection (1) shall be admissible or used as provided for in that subsection if the making of the statement appears to the court to have been caused

by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the court to give that person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

(3) Where any person is arrested or is informed that he may be prosecuted for any offence under this Act, he shall be served with a notice in writing, which shall be explained to him, to the following effect:

> You have been arrested/informed that you may be prosecuted for.... the possible offence under this Act). Do you wish to say anything? *If there is any fact on which you intend to rely in your defence in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.* (Emphasis added.)

(4) Notwithstanding subsection (3), a statement by any person accused of any offence under this Act made before there is time to serve a notice under that subsection shall not be rendered inadmissible in evidence merely by reason of no such notice having been served on him if such notice has been served on him as soon as is reasonably possible thereafter.

(5) No statement made by an accused person in answer to a written notice served on him pursuant to subsection (3) shall be construed as a statement caused by any inducement, threat or promise as is described in subsection (2), if it is otherwise voluntary.

(6) *Where in any criminal proceedings against a person for an offence under this Act, evidence is given that the accused, on being informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time he could reasonably have been expected to mention when so informed, the court, in determining whether the prosecution has made out a prima facie case against the accused and in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper; and the failure may, on the basis of those inferences, be treated as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material* (emphasis by this court).

(7) (7) Nothing in subsection (6) shall in any criminal proceedings

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from that subsection; or

(b) be taken to preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from that subsection.

[40] How does the ACA or the investigating agency expect the appellant to disclose his defence or answer the charges or the report lodged against him in the said statement unless he is informed exactly the details of the report and shown the exhs P6 and P9 as he is required to mention any such facts pursuant to sub-ss (3) and (6) of s 45 of the Act.

[41] On one hand the appellant is expected to mention his story or defence in the statement pursuant to sub-s (3) of s 45 of the 1997 Act and to mention such facts on which the appellant intend to rely in his defence in court. On the other hand, the

A appellant is not informed of the accusation which has been made against him and in the instant case, he was also not shown the money (exh P6 and P9) handed to PW12 by PW1. Infact, there is no evidence whether the appellant has been informed of the details of the report by PW1 on 6 April 2001 and of the alleged incidents on 6 April 2001 and 9 April 2001 in the appellant's house and the accusation made against him
B so far as to enable the appellant to give detail explanation in his statement unless there was a question and answer session which is not the position in the instant case when looking at the statement (exh D28) (see *Ahmad Shah Bin Hashim v Public Prosecutor* [1980] 1 MLJ 77 at p 83; *Mohd Alias v Public Prosecutor* [1989] 2 MLJ 172 at p 173; *Nachatar Singh Bhag Singh v Public Prosecutor* [1986] 2 CLJ 452 at p 457).
C In the circumstances, it is grossly unjust to take the omissions in the statement (exh D28) as an issue when compared to his defence in court and rule it as contradictions, as omission and contradiction are not the same and has to be given different treatment in law. Accordingly, the learned session court judge had erred in law in the evaluation of the evidence and the handling of the facts and coupled with the fact that no weight was given to the statement (exh D28) which has supported the
D defence story in court. Further the appellant's story was supported by the testimony of DW2 on to the second charge. In fact, the learned sessions court judge had erred in law when he disregarded the statement (exh D28) on the ground that the statement is not substantive evidence which ruling is contrary to the *ratio decidendi* in *Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 38 (see *Lim Yow Choon v*
E *Public Prosecutor* [1972] 1 MLJ 205; *Chee Chiew Heing v Public Prosecutor* [1981] 2 MLJ 287; *Public Prosecutor v Mohamed Noor Jantan* [1979] 2 MLJ 80; *Adzhar Ahmad v Public Prosecutor* [1986] 4 MLJ 85 at p 93; *Public Prosecutor v Lin Lien Chen* [1991] 1 MLJ 316 (HC); [1992] 2 MLJ 561 (SC); *Chee Chiew Heong v Public Prosecutor* [1981] 1 MLJ 289 at p 288; *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70at p 75; *Public Prosecutor v Halwin* [1995] 2 SLR 424; *Mohd Sallehuddin Mohd*
F *Yusof v Public Prosecutor* [2005] 3 AMR 491 at pp 528, 545). There has been gross miscarriage of justice when the learned sessions court judge disregarded the statement (exh D28) on the ground that the statement (exh D28) is not a substantive evidence when infact the significance and importance of the statement has been clearly explained in subsection (3) and (6) of s 45 of the Act and the case in *Francis Anthony*
G *v Public Prosecutor* [2005] 3 MLJ 38).

DEFENCE

[42] The trial court is duty bound by the principle of justice and fairness to
H judicially appreciate the defence case and consider all relevant aspect of the defence including those parts of the evidence of the prosecution that may tell in favour of the defence and not just provide lip service by merely saying it had considered the defence (see *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19; *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; *Gunalan Ramachandran & Ors v*
I *Public Prosecutor* [2006] 2 MLJ 197; *Kumaraguru a/l N Muniandy & Ors v Public Prosecutor* [1994] 1 MLJ 254).

[43] In the instant case, this court is satisfied that the defence of the appellant is not a bare or mere denial or a case where the appellant had offered no explanation to the prosecution case or a case where he has simply denied the evidence against him

or has offered nothing in support of the defence case. On the contrary, the appellant, apart from denying certain aspects of the prosecution's case, had infact, adduced sufficient material before the court when viewed in its totality which included the evidence of DW2 and the statement (exh D28) could be capable of belief or having created a reasonable doubt on the prosecution case and rebutted the presumption under s 42 of the Act which was invoked by the learned sessions court judge. Infact, the defence story was supported by the appellant's statement (exh D28) and the evidence of Osmani (DW2) (see *Public Prosecutor v Lim Ah Bek* [1989] 2 CLJ 1090; *Public Prosecutor v Lin Lien Chen* [1991] 1 MLJ 316 (HC); [1992] 2 MLJ 561 (SC); *Adzhaar bin Ahmad & Ors v Public Prosecutor* [1996] 4 MLJ 85). It is also important to be reminded that no matter how weak or unreasonable defence story may be, the court cannot brush it aside without any proper judicial evaluation or due consideration is given and not just provide lip service (see *Balasingham v Public Prosecutor* [1959] MLJ 193; *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 at p 142; *Gunalan Ramachandran v Public Prosecutor* [2006] 2 MLJ 197; *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577; *Alcontara a/l Ambross Anthony* [1996] 1 MLJ 209; *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; *Public Prosecutor v Mohd Zulkifli bin Abdul Ghani & Anor* [2003] 5 MLJ 337; *R v Manuel* [1998] CrLR 347; *Ong Ah Too v R* [1955] MLJ 247; *R v Porritt* [1961] 45 Cr Appeal Report 348 at 356; *Koaku Mensa v The King* 1946 AC 83; *Chee Chiew Hong v Public Prosecutor* [1981] 2 MLJ 287; *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; *Public Prosecutor v Johal Mustafa* [2004] 5 CLJ 187; *R v Belson* 534 CrAppeal Report 11; *Liew Siew v Public Prosecutor* [1969] 2 MLJ 232; *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 16 at p 171). Falsity of the defence does not also relieve the prosecution from proving the charge against the appellant beyond reasonable doubt (see *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; *Woolmington v Director of Public Prosecution* 1935 AC 462 at p 481).

[44] It is the considered view of this court that from the totality of defence story, it is apparent that the version is at variance with that of the prosecution story. Therefore, it was incumbent upon the trial court to analyse and assess both the prosecution and the defence evidence in its totality and not to just brush aside the defence story as not being probable without proper judicial evaluation (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 at p 723; *Mohd Sallehuddin Mohd Yusof v Public Prosecutor* [2005] 3 AMR 491).

[45] On the sets of facts in the instant case, this court is of the considered view that the defence story when taken together with the evidence of DW2 and the statement (exh D28) was neither improbable nor unreasonable or can it be considered as bare defence. In fact, the failure of the ACA to arrest the appellant at the earliest opportunity when all the evidence produced at this trial was available as early as 9 April 2001, has also raised a nagging doubt in the prosecution case. There is also no evidence whether any further investigation was carried out on the statement (exh D28) given by the appellant on 14 April 2004 before he was charged in court on the same day on 14 April 2004 based on a consent dated 9 April 2004 (exhs P1 and P2). The learned sessions court judge had misdirected himself by failing to properly assess or evaluate the appellant's case judicially and at all angles as the trial court must give equal treatment to the evidence of the prosecution and the defence's

witnesses (see *Anil Sharma v State of Jarkhand* AIR 2004 SC 2294). In the instant case, as started above, PW1 is a willing participant in the alleged offence and not the victim of the offence (see *Srinivas Mall v Emperor* AIR 1947 PC 135). Therefore, the learned sessions court judge ought to have directed his mind on the twin tests of reliability and requirement of corroboration (see *Yap Peng Hin v Public Prosecutor* [1991] 3 CLJ 1907).

[46] On the other hand, however and whatever evidence of the appellant the suspicion is against the appellant, he is still entitle to an acquittal if the story is reasonable or probable of innocence which cannot be excluded (see *Cooper v Slade* 1858 6 AC 746; *R v Dunbar* [1957] All ER 5737; *Dayabhai Changanbhai v State of Gujurat* AIR 1964 SC 1563, *R v Cart Briant* 1943 1 KB 607; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89). The statement (exh D28) is a significant and important material to the defence case and if proper weight was given as it ought to have been given in law and coupled with the evidence of DW2, it may have made a difference in the decision of the learned sessions court judge and entitled the appellant to an acquittal (see *Yusuf bin Kassim v Public Prosecutor* [1992] 2 MLJ 183 at p 185).

[47] This court is of the considered view that it would be an improper evaluation of the defence case if the statement (exh D28) is rejected as being not substantive evidence upon an erroneous understanding of the law. The learned Sessions Court judge ought to have considered the statement (exh D28) of the appellant together with the defence's story and the evidence of DW2 when evaluating the whole of the case but unfortunately the evaluation of the evidence was not considered judicially. The burden cast on the appellant to rebut the statutory presumption under s 42 of the Act if it was applied and rightfully invoked was only a light one. Therefore, this court is of the considered view that on the assumption and in the event the presumption was rightfully invoked and in the circumstances had some reliance been placed on the evidence of DW2 and the statement of the appellant (exh D28), there was strong probability that the appellant may have succeeded in rebutting the statutory presumption and the benefit of doubt given to the appellant (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 69; *Mohd Alias v Public Prosecutor* [1983] 2 MLJ 172). Consequently, on the evidence as a whole, it cannot be said it would be safe to uphold the conviction by reason of the doubt as to the adequacy of the direction concerning the appellant's case (see *DP Vijandran v Public Prosecutor* [1999] 1 MLJ 385).

[48] In the case of *Hai Man v Public Prosecutor* [1952] 1 MLJ 216, the Court of Appeal has said as follows at p 216:

> The assessors should have been told that *even if they were not convinced of the truth of the story of the appellant, nevertheless, if it left them uncertain of his guilt, he was still entitled to a verdict of 'Not guilty'*. In the circumstances we consider that the appeal should be allowed and the conviction quashed.'(emphasis by this court.)

[49] In the case of *Ng Chai Kem v Public Prosecutor* [1994] 2 MLJ 210, the Federal Court has said as follows at p 218:

> We are of the opinion that in ordinary circumstances where the prosecution invokes a statutory presumption to prove its case, a mere denial by the accused either made orally or by implication from evidence contra positive to the presumed fact must necessarily be regarded as a refutation of the presumption by the defence.
>
> In such event the trial judge is under a duty to re-examine the factual dispute however trivial affecting the presumed fact and come to a definite conclusion on the balance of probabilities. Failure to do so would tantamount to a serious denial of justice.

[50] However, assuming even the worse against the appellant with regard to his defence, it was still necessary to consider the rest of the evidence which was produced in support of the defence case. The paramount principle of criminal law is that the defence, however weak it may be, is raised by an accused person; it should be fairly considered and evaluated against the prosecution case (see *R v Dinnick* 3 CrAppRep 77 at p 79). In another words, the trial court must not consider the defence case in isolation but ought to have viewed the whole of the evidence objectively and from all angles (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 at p 142; *Mat v Public Prosecutor* [1963] MLJ 263; *Mah Kok Cheong v R* [1953] MLJ 46; Selangor Criminal Appeal No 168 of 1973 *Harnam Singh v Public Prosecutor* (appendix F) *Law of Bribery and Corruption in Malaysia with Cases and Commentaries* by Jagjir Singh). The weakness of the defence however does not necessarily compensate for inadequacies in the prosecution case (see *Goh Khiok Phiong v R* [1954] MLJ 223 at p 226).

[51] In *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 at p 18 Sharma J said:

> A conviction cannot be sustained even if the court is satisfied that the prosecution story 'may be true' unless and until it is found that the prosecution story 'must be true.' The burden of proof remains on the prosecution throughout the trial.
>
> The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt.

[52] In *Public Prosecutor v Sainal Abidin Mading* [1998] 3 CLJ 41 at p 43, Richard Malanjum J (as His Lordship then was) said:

> To secure a conviction on the charge preferred the burden of proof remains with the prosecution throughout. The standard of proof required is beyond reasonable doubt. There is no similar burden on the accused. He is presumed innocent until proven guilty. And in order to avoid a conviction on the charge preferred the accused is only required to introduce a reasonable doubt in the prosecution case. His version may not necessarily be true. *But if it succeed in creating a reasonable doubt in the prosecution case, that is sufficient to defeat the charge preferred* (emphasis by this court).

[53] In the instant case, the appellant had called a material witness namely, Osmani (DW2) to testify as to what had occurred on 9 April 2001 in the appellant's house which in fact supports the appellant's defence that he did not hand or give any money to PW1. In fact, DW2 has categorically denied seeing the appellant handing any money to PW1 on the second charge which tend to show that no such payment was handed to PW1 (see *S Narayanan Pillai v State of Tamil Nadu* 1993 CriLJ 1303 (Mad) at 1309). It is important to be reminded at this stage that the learned DPP from the Bar said that DW2 was not called in support of the prosecution case because he was found to be a hostile witness for the prosecution. On the other hand, as stated above, it is interesting to note that the learned sessions court judge had found that the testimony of DW2 had destroyed the defence case. It is for this reason that this court has stated at the beginning that the prosecution should have called Osmani (DW2) to testify as its witness so that the court would be in a better position to judge him instead of the prosecution having unilaterally treated him as a hostile witness. This court is entitle to regard the appellant's story in his defence coupled with his statement (exh D28) and the version given by Osmani (DW2) who was in fact very much a witness intended for the prosecution but declined to be called or even offered for cross examination that the appellant's defence even if it may not be convincing but is consistent with innocence.

[54] As stated above, this court is unable to appreciate how Osmani (DW2) has been branded a hostile witness by the learned DPP when all he has said in his evidence for the defence is that he did not witness the appellant handing or giving any money to PW1 although he was present. Does the fact that DW2 who said he did not witness any transaction between the appellant and PW1 on 9 April 2001 make him a hostile witness and at what stage is a witness to be considered whether he is a hostile witness and by whom. Certainly it must be the court who will be in a position to see and hear him give evidence and then evaluate his evidence with the rest of the evidence. '…the independence of the judiciary is a priceless treasure to be cherish and safeguard at all cost…and it is of the essence that public confidence in the independence of judiciary should not be undermined by any…' (per Bhagwati J (as he then was) in *Rao Shiv Bhadur Singh & Ors v State of Windh* AIR 1954 SC 322 at p 332. On the other hand, the conduct of PW1 from the time he contacted PW12 and the conduct of PW12 during the entire episode seemed to throw doubt on the truth of the prosecution case when viewed in its entirety which entitled the appellant to be given benefit of doubt however weighty the suspicion might be.

[55] On the second charge, this is a clear case that Osmani (DW2) was present with the appellant and PW1 on 9 April 2001 at the appellant's house and three other persons and yet the prosecution did not call Osmani (DW2) as a witness or even offer him during the prosecution case for the defence to cross-examine him so as to assist the court to ascertain the truth of the prosecution case but instead contended that he is a hostile witness when there is no such evidence before the court to classify DW2 as a hostile witness. This court cannot accept the argument as tenable. In fact, during the cross examination of DW2 by the prosecution, it was not even put to Osmani (DW2) that he was hostile witness or he was lying in court or that he was merely

trying to help the appellant even though he had seen the alleged payment being handed to the PW1 and has turned hostile.

[56] On the totality of the evidence and considering the position taken by the prosecution not to have called Osmani (DW2) as a witness or offered him for the defence during the prosecution case, this court with respect, is of the view that the learned session court judge ought to have invoked s 114(g) of the Evidence Act 1950 and drawn an adverse inference against the prosecution. The fact that the prosecution has offered Osmani (DW2) to the defence after the close of the prosecution case will not in the considered view of this court permit the prosecution to escape or absolve them from its duty to establish the charges against the appellant as required by law (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16).

[57] On the totality of the findings by the learned Sessions Court judge, he had erred in law and on the facts first, by invoking the presumption under s 42 of the Act when there was insufficient material to trigger the same. Secondly, he had erred in law and on the facts when he had failed to treat PW1 as an accomplice or as an unreliable witness. Thirdly, he had erred in law when he had failed to consider whether the twin tests, namely, reliability and corroboration has been satisfied by the prosecution. Fourthly, he had erred in law and on the facts when he had failed to invoke the adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution for failure to call Osmani (DW2) as a witness or offer him during the prosecution case to the defence to cross examine him. Fifthly, the learned sessions court judge had failed to carry out a maximum evaluation of the evidence produced by the prosecution as required by law and instead, with respect, he has merely provided lip service to all the flaws that were raised by the defence at the close of prosecution case. Sixthly, he had erred in law in the evaluation of the appellant's story which in fact was supported by statement (exh D28) and the testimony of Osmani (DW2).

[58] This court is of the considered view that if the evidence upon the record is tainted or otherwise lacks probity in such a way as to lead this court that, even to conclude after making full allowance for the advantages enjoyed by the trial court, there is a significant possibility that an innocent person has been convicted then it becomes the duty of this court to act and to set aside the conviction based on that evidence (see *M v The Queen* [1994] 181 CLR 487).

[59] In conclusion, this court finds that the appellant has been able to successfully demonstrate at this appeal the material errors in the findings of the learned session court judge in the evaluation of the evidence. Therefore it necessitates reconsideration by this court of the complaints canvassed in the trial court and at the hearing of this appeal which is a rehearing of the recorded evidence. However, when this court applies the correct test and surmounts the error of reasoning by the learned sessions court judge which the learned leading counsel for the appellant had demonstrated, this court finds the decision of the trial court is unreasonable and could not be

supported having regard to the evidence as a whole. This is not a case where the non-directions or failure of misdirections could have had no effect whatsoever on the findings made by the learned session court judge, so as to reject them as being insignificant. It is a clear case when considering the totality of the evidence and with a proper judicial evaluation of the entire case it would have tilted the case in favour of the appellant or at least would have cast doubt on the prosecution case and afforded the benefit of doubt which ought to been given to the appellant however strong the suspicious may have transgressed into the prosecution case. To disregard a relevant fact, the statement (exh D28) which has a bearing on the appellants' case and taking into consideration irrelevant facts would be a miscarriage of justice in order to derive at a just decision and this is not a case in which this court can safely say that there has not been such a miscarriage.

[60] Having given careful consideration to the whole history of this unfortunate state of affairs derived from the notes of evidence, the persuasive argument by leading counsel for the appellant at this appeal, this court, with respect, finds that the learned session court judge had erred in finding the appellant guilty of both the charges. Infact, there has also been manifest and glaring error of the learned sessions court judge in handling of the facts (see *Mohd Johi bin Said & Anor v PP* [2005] 5 MLJ 409; *Chow Kok Keong v PP* [1998] 2 MLJ 337; *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; *R v Wright* 58 CrAppeal Report 444; *Yusuf Kassim v Public Prosecutor* [1992] 2 MLJ 183 at p 188).

[61] Having reviewed the whole of the evidence in the instant case so far as it was material with the assistance and able arguments of both leading counsels for the appellant and the learned DPP, this court is of the considered view that this is a suitable case and would be justified to interfere with the decision of the learned sessions court judge. The decision of the learned sessions court judge in rejecting the defence case and the statement (exh D28) of the appellant which was given by the appellant pursuant to s 45 of the Act as a mandatory requirement, the decision is unreasonable and against the weight of the evidence given at the trial. It would be also wrong to uphold a conviction on the two charges only on a finding that the learned session court Judge had the advantage to see and hear the witnesses giving evidence where in fact the learned session court judge had failed to evaluate the evidence sufficiently and judicially and has misdirected himself on many aspects on the facts and the application of the law. An unsafe conviction cannot be converted into a safe one. The prosecution case was also transparently weak with inconsistencies and improbabilities which warrant an acquittal when considering the application of maximum evaluation of the prosecution case in order to find a prima facie case.

[62] This court is of the considered view that the cumulative effect of the misdirections or non directions as highlighted in this judgment and the several defects in the way the learned sessions court judge had handled the facts and had misdirected himself renders the decision to call for the defence unsafe (see *Keane* 1977 65 CrAR 247). Infact, the balance of evidence is against the conviction. Accordingly, the conviction is unsafe and unsatisfactory to uphold.

[63] In accordance with reason and justice, the appeal by the appellant is allowed, the conviction as per both the charges is quashed and accordingly, the sentence of imprisonment is set aside and the fine if it has been paid is ordered to be refunded to the appellant. The appellant is acquitted and discharged on both the charges.

Appeal allowed.

Reported by Sally Kee